



# NEPA Compliance for Corps Decisions under the BDCP

U.S. ARMY CORPS OF ENGINEERS

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## Background

The Bay Delta Conservation Plan (BDCP) is a Habitat Conservation Plan (HCP) being developed to promote the recovery of endangered, threatened and sensitive fish and wildlife species and their habitats in the Sacramento-San Joaquin Delta in a way that will improve reliability of water exports to. The BDCP is being lead by the California Department of Water Resources (DWR), Bureau of Reclamation, and south of Delta, State Water Contractors and Federal Water Contractors.

If approved by U.S. Fish and Wildlife Service and National Marine Fisheries, the BDCP would provide "Take" under Section 10 of the Endangered Species Act for the following actions:

- State Water Project (SWP) diversion and maintenance from the existing SWP points of diversion at Clifton Court Forebay and Barker Slough Pumping Plant;
- SWP Operation and Maintenance of the Skinner Delta Fish Protective Facility and Banks Pumping Plant;
- Construction, operation, and maintenance of a new SWP north of Delta intake facility and conveyance (pipeline or canal);
- Construction, operation, and maintenance of a new SWP North Bay Aqueduct intake facility and conveyance (pipeline or canal);
- Numerous habitat restoration actions to restore: 65,000 acres of freshwater and brackish tidal, subtidal, and transitional habitats; 20 linear miles of channel margin habitat; 5,000 acres of riparian habitat; 2,000 acres of grassland habitat; 400 acres of nontidal perennial emergent wetland and nontidal perennial aquatic habitat; up to 89 acres of vernal pool complex habitat; and 320 acres of managed seasonal wetland habitat; and
- Numerous physical and operational alterations to the Yolo Bypass to improve fish passage and enable 10,000 acres to be subject to an increased duration and frequency of inundation.

An Environmental Impact Report/Environmental Impact Statement (EIR/EIS) is being prepared under the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), respectively, for the BDCP. The CEQA lead agency is DWR and the NEPA lead agencies, serving jointly, are the BOR, USFWS and NMFS. The Lead Agencies intend for the BDCP EIR/EIS to be a programmatic document for the entire BDCP and provide project-level detail for the construction of new SWP north of Delta intake facilities and conveyance (pipeline or canal) and the operations of the new intakes and the existing SWP and CVP facilities. The Corps agreed to be a cooperating agency on the EIS/EIR in November 2008.

The Corps has jurisdiction over BDCP-related actions under Section 404 of the Clean Water Act (CWA 404) and Sections 10 and 14 of the Rivers and Harbors Act of 1899 (RHA 10 and 14). Actions that involve a discharge of dredged or fill material in waters of the U.S. under CWA 404 and/or structures or work located in, on or over navigable waters under RHA 10 require a Department of the Army permit under the Corps Regulatory Program, which is administered by the District's Regulatory Division. For

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action that affect Federal projects, permission under RHA 14, also known as Section 408, is required. Section 408 is administered by or processed through the District's Operations Branch depending on the type of action. Because the Corps jurisdiction and scope is not the entire BDCP program, the Corps will not make one permit decision on the BDCP as a whole. Many of the individual actions (parts of the whole) will however require Corps approval.

The first BDCP action DWR proposes to undertake is the construction of new water intakes, a new water conveyance pipeline or canal, and new operations of the State and Federal water projects. The Corps jurisdiction over this initial project of the BDCP is CWA 404, RHA 10 and Section 408. The schedule of BDCP permit process proposed by DWR is as follows:

- Mid-2013 - Completion of BDCP EIR/EIS
- Mid-2015 - Applications for the construction of water intakes, conveyance pipeline or canal, and new operations of the State and Federal water projects to Corps for CWA 404 and RHA 10 and 14.
- Mid-2017 - Permit decisions for the construction of new water intakes, a new water conveyance pipeline or canal, and new operations of the State and Federal water projects from Corps

This proposed schedule is dependent on several factors, most of which are beyond the control of the Corps. Sacramento District continues to meet, consult, coordinate, and cooperate with DWR and sister Federal agencies to ensure the parties understand the necessary requirements for permitting. At this point in time, there appears to be a high probability that DWR and sister Federal agencies will not be able to meet this schedule due to public controversy, inability to obtain necessary technical data to support engineering and design, and the potential for litigation.

### **Corps NEPA Compliance Strategy**

As a cooperating agency, the Corps intends to use the EIR/EIS to the maximum extent possible to facilitate decision-making. At the program level, the Corps will recognize the BDCP EIR/EIS as a "Tier 1" document upon which later project-specific NEPA documents would recognize. Assuming the EIR/EIS addresses Corps concerns and program needs and includes sufficiently detailed information and analysis about the construction and operation of the intake facilities and conveyance, the Corps would adopt the EIR/EIS and make a permit decision on that element of the BDCP.

For project-level compliance with NEPA, the BDCP EIR/EIS will need to address several factors and requirements to support the Corps' permitting actions.

1. Overall Purpose. The EIR/EIS should include a specific overall purpose statement for the purpose of evaluating alternatives under EPA's 404(b)(1) guidelines. Although the goal would be to have a single NEPA/404(b)(1) purpose statement, a CWA Section 404 overall purpose statement may be needed to ensure appropriate practicable alternatives are evaluated. The Corps needs to concur with the overall purpose statement. The BDCP EIS/EIR should ensure that the practicable alternatives needed to comply with 404(b)(1) are merged into the reasonable range of alternatives addressed in the document.

2. Alternatives. The alternatives analysis should be thorough enough to use for both the Corps' public interest review and compliance with the 404(b)(1) guidelines. The BDCP EIR/EIS will need to address all of the Corps public interest review factors, including commercial and recreational boating, and evaluate practicable alternatives that would have less impact on the aquatic environment. The Corps will need to concur with the range of alternatives as well as the evaluation criteria upon which the

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alternative will be evaluated.

3. Mitigation Sequencing. The BDCP EIS/EIR should describe the specific measures to avoid, minimize and mitigate impacts to waters of the U.S. The plan for compensatory mitigation should have specific information and be developed in accordance with 33 CFR Part 332.

4. Executive Order 11988. The BDCP EIS/EIR should demonstrate compliance with Executive Order 11988, and DESCRIBE EO11988

5. Flood Risk Impacts. The BDCP EIS/EIR should disclose impacts to flood risk, including transfer of risk and residual risk, in the project area and throughout the flood system, both individually and cumulatively. Section 408: As with any document including project-specific coverage, the NEPA compliance document needs to adequately support the final design of the project.

What about wetland delineation?

Cumulative impacts?

Using a watershed approach?

Protecting highest quality stuff?

#### **Need for Additional NEPA Documentation**

At this time, and based on indications by DWR, the EIR/EIS under development will not be adequate to support Corps Section 408 permitting as it currently is based on 10% designs which leaves a large margin for changes in design and impacts. As such, the need for additional NEPA documentation is anticipated, although this cannot be determined until at least until 65% designs have been provided and reviewed.

#### **Point of Contact**

Michael G. Nepstad  
US Army Corps of Engineers, Sacramento District  
1325 J Street, Room 1350  
Sacramento, California 95814  
Email: michael.a.nepstad@the Corps.army.mil

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